UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA & STATE OF NEW YORK,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 1:17-CV_-470 [BKS/DJS]
MPM SILICONES, LLC,	)	
Defendant.	)	

COMPLAINT

Plaintiffs, the United States of America ("United States"), through its undersigned attorneys, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of New York ("NYS"), through its undersigned attorneys and at the request of the Commissioner of the NYS Department of Environmental Conservation ("DEC"), for their complaint against Momentive Performance Materials Silicones, LLC ("MPM" or "Defendant"), allege as follows:

I. NATURE OF ACTION

1. This is a civil action brought against MPM pursuant to Sections 113(a) and (b) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(a) and (b), and Sections 3008(a) and (g) of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (referred to collectively as "RCRA"), 42 U.S.C. §§ 6928(a) and (g), seeking civil penalties for violations of federal law and the federally-approved provisions of New York law, including Environmental Conservation Law ("ECL") Article 19, Titles 1 and 3; Article 27, Title 9; and

Article 71, Title 27, and the implementing regulations in the New York Code of Rules and Regulations ("NYCRR"), Title 6, Parts 200-201 and 370-376. These laws and regulations have as their express purpose the protection of human health and the environment.

2. The claims arise from MPM's ownership and/or operation of a rotary kiln incinerator ("Incinerator") at a manufacturing facility located at 260 Hudson River Road in Waterford, New York ("Waterford Facility" or "Facility"). MPM owned and/or operated the Incinerator in a manner that violated the CAA and RCRA, ECL Articles 19 and 27, the implementing regulations under those laws, and the NYS permits issued pursuant to those laws.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. §§ 6928(a), 7413(b), 28 U.S.C. §§ 1331, 1345, and 1355; and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 and ECL §§ 71-2103 and 71-2705.

4. Venue is proper in the Northern District of New York pursuant to 42 U.S.C. §§ 6928(a), 7413(b), and 28 U.S.C. §§ 1391 and 1395 because the violations alleged herein occurred in this District.

III. NOTICE

5. The United States has notified NYS of this action pursuant to 42 U.S.C. §§ 6928(a)(2), 7413(b)(3) and NYS is also a plaintiff in this action.

IV. DEFENDANT

6. Since December 4, 2006, MPM has owned and/or operated the Waterford Facility.

7. At the Facility, MPM has manufactured various products, including sealants made of silicone. The silicone-manufacturing process generated a significant amount of "hazardous waste," a term of art defined in RCRA and CAA regulations. MPM employees were

authorized to dispose of the hazardous waste in the Incinerator, subject to compliance with the CAA and RCRA, which includes those Acts' implementing regulations and the NYS permits issued pursuant to the CAA ("Title V Permit") and RCRA ("RCRA Permit") (collectively, "the Permits").

8. MPM is a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e); Section 1004(15) of RCRA, 42 U.S.C. § 6903(15); ECL §§ 19-0107(1) and 27-0901(7); and 6 NYCRR §§ 200.1(bi) and 370.2(141).

MPM as Owner/Operator of the Waterford Facility

9. In September 2006, MPM's parent company, Nautilus Holdings Acquisition Corporation ("Nautilus"), entered into an agreement to purchase the Waterford Facility from the General Electric Company ("GE") pursuant to a Stock and Asset Purchase Agreement ("SAPA").

10. In connection with the SAPA, GE entered into a Services Agreement with Nautilus under which GE agreed, among other things, to provide personnel to operate the Incinerator from December 4, 2006 through February 7, 2007.

11. Effective December 4, 2006, ownership and operation of the Facility was transferred from GE to MPM. On that date, MPM became the "owner" of the Facility, as that term is used in 40 C.F.R. § 63.2 and 6 NYCRR §§ 200.1(bc) and 370.2(137).

12. On November 30, 2006, MPM filed an application with DEC requesting that the State's environmental permits pertaining to the Facility be transferred to MPM effective December 4, 2006. DEC thereafter granted MPM's application.

13. When the Services Agreement with GE to operate the Incinerator ended, on or about February 7, 2007, MPM, in addition to being the "owner" also became the "operator" of the

Incinerator, as the latter term is used in 40 C.F.R. § 63.2 and 6 NYCRR §§ 200.1(ba) and 370.2 (136).

V. Rotary Kiln Incinerator

14. MPM used the Incinerator to burn hazardous wastes generated onsite. The Incinerator consisted of a rotary kiln and a secondary combustion chamber. The Incinerator also included air-pollution control systems including a rapid quench chamber, a counter-current packed scrubber, and two three-stage ionizing wet scrubbers ("Scrubbers"). Flue gas was pulled through the pollution control devices by two induced draft fans. The exhaust from these two fans was directed to a common stack.

15. If the Incinerator was ever inoperable, MPM would shut down or delay certain operations at the Facility.

16. MPM was required by the Permits and the CAA regulations to monitor approximately 76 operating parameters or limits related to the Incinerator's operation. Each parameter was monitored using a specific monitoring device, (*e.g.*, flow meters, pressure gauges, temperature monitoring devices, etc.). Incinerator monitoring data demonstrating compliance with the Permits' limits was generated as instantaneous values, as one-minute block averages or as 1 minute, 10 minute, hourly, or 12 hour rolling averages.

17. The Incinerator utilized a computer system and associated devices to gather and record operating parameter data generated by the monitoring devices. A monitoring device's measured value was converted to a digital value and then transmitted to the digital control system known as "Provox." Provox was the main computer control system for the Incinerator. Provox received data from the operating parameter monitoring devices at least once every 15 seconds. Some of the Incinerator's operating parameters were monitored

based upon their instantaneous value (*e.g.*, combustion chamber pressure, temperature, etc.), while others were monitored based upon an average value (either one-minute block averages or rolling averages of 1 minute, 10 minutes, 1 hour or 12 hours). Provox calculated any required averages from the instantaneous values it received. Provox compared these values to the Incinerator's permit limits and was designed to shut down the waste feed to the Incinerator if the values were outside the permit limits.

18. Provox, which had a console, also sent signals to the various devices that operated the Incinerator. The Provox console provided the Incinerator operators with real-time operating data.

19. The Facility was required to record the Incinerator's operating data as it became available and maintain this data in the Facility's operating record. The data was maintained in a data-historian system known as the "PI system," which recorded and stored the Incinerator's operating data values received from Provox. The PI system recorded the Incinerator's operating data, including the date and time of each data point received from Provox.

20. The Incinerator also had an automatic waste feed cut-off ("AWFCO") system that was designed to automatically stop the flow of hazardous waste to the Incinerator if any of the 76 operating parameters violated the limits in the Permits, the applicable regulations, or established by performance testing. If any data value was not in compliance with the Permits' limits, Provox automatically initiated an AWFCO, thereby halting the flow of hazardous waste to the Incinerator. Provox continued to receive operating parameter values during the period in which the AWFCO was initiated and the hazardous waste feed to the Incinerator was halted. Hazardous waste feeds to the Incinerator could not be started again until all the Incinerator's operating parameters were within the Permits' limits.

21. The Permits required the Incinerator's monitoring devices to undergo routine calibrations to ensure the accuracy of the monitoring devices and, hence, the data generated from these devices. For instance, the Incinerator's carbon monoxide ("CO") and oxygen monitoring devices were to be calibrated daily; the ionizing wet scrubber pH meters were to be calibrated weekly; and all remaining monitoring devices (*e.g.*, temperature, pressure, flow meters) were to be calibrated monthly. The use of "calibration mode," or Cal-Mode," while feeding hazardous waste was allowed by the Permits once per day for CO and oxygen calibrations.

22. Incinerator operators avoided the AWFCOs by placing monitoring devices into "calibration mode" or "Cal-Mode." Cal-Mode allowed the Incinerator to continue operations even while violating the Permits limits. The use of Cal-Mode allowed MPM employees to avoid triggering the AWFCO system and shutting down the hazardous waste feeds to the Incinerator. MPM's Incinerator operators initiated Cal-Mode for the operating parameters by using the Provox console. The operators would have to take each operating parameter offline separately.

23. Provox was connected to an event historian called Logmate, which recorded the date and time when the operating parameters were placed into Cal-Mode, and by whom.

24. When an averaged operating parameter was placed into Cal-Mode, Provox held the last averaged operating parameter value calculated prior to the initiation of Cal-Mode. This allowed the averaged readings from operating parameter monitors to remain below, or above, the corresponding limit while the monitors were calibrated. While the averaged readings stayed below, or above, the corresponding limit, Provox would not send a signal to the AWFCO system to cut off the waste feed.

25. During Cal-Mode, the PI system continued to record the operating parameter values, including the date and time each value was received by the digital control system.

26. For operating parameters that were required to be monitored on an instantaneous basis by regulation or the Permits (such as combustion chamber pressure), the signal from Provox to initiate the required AWFCO was interrupted during Cal-Mode.

27. When an operating parameter was outside its permit limit, the AWFCO was designed to automatically cut off the waste to the Incinerator until that parameter was again within the Permits limit. By cutting off the hazardous waste feed to the Incinerator, the AWFCO prevented additional hazardous waste from being incinerated while the Incinerator was operating outside its permit limits. The AWFCO system was designed to limit the release of hazardous constituents into the environment.

28. The Provox system had a built-in Cal-Mode function for 14 monitoring devices. The function of this mode was to avoid AWFCOs during calibration of the monitoring devices.

29. On more than one occasion, Incinerator operators placed the Incinerator in Cal-Mode for instantaneously or continuously monitored parameters (*e.g.*, combustion chamber pressure or stack gas flow rate), in order to avoid AWFCOs. By doing so, Incinerator operators either prevented the signal from Provox from activating the hazardous waste feed shut-off-valve(s), or held the last averaged operating parameter value calculated prior to the initiation of Cal-Mode, preventing the automatic hazardous waste feed shut-off valve(s) from activating as required.

30. Cal-Mode was an original part of Provox. Using Provox, operators were able to place the Incinerator in Cal-Mode for a specific parameter from their computer console.

31. The Permits and CAA regulations required the owners and/or operators of the Facility to

submit monthly reports, annual compliance certification reports, and semi-annual compliance monitoring reports to DEC addressing the operation of the Incinerator.

32. The Permits and regulations required the owners and/or operators of the Facility to monitor and report to DEC that the operation of the Facility was in compliance with the Permits and the regulations.

33. MPM's annual compliance report for 2006 affirmatively states that the Facility is in compliance with the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors, 40 C.F.R. §§ 63.1200–1221 (Part 63, Subpart EEE) and 6 NYCRR § 200.10.

34. Under its RCRA Permit, MPM was required to submit to DEC "monthly reports summarizing the operations of the rotary kiln incinerator for the calendar month." In these monthly reports, MPM, at a minimum, was required to list: (i) the total number of AWFCOs; (ii) the number of AWFCOs by operating parameter; (iii) for each AWFCO, the date and time of the incident, operating parameter causing the cutoff, the operating parameter's AWFCO limit, maximum or minimum value that the operating parameter reached outside of the operating conditions (only for CO, combustion chamber temperature and combustion chamber pressure), duration that operating conditions were exceeded and any corrective measures taken; and (iv) ongoing efforts to reduce the number of AWFCOs.

35. MPM failed to report all unauthorized uses of Cal-Mode to DEC as required.

36. From December 4, 2006 through November 22, 2008, MPM was responsible for placing the Incinerator into unauthorized Cal-Mode thousands of times. As a result of its unauthorized use of Cal-Mode, MPM released hazardous substances to the environment in violation of the conditions set forth in its permits, and Federal and NYS law.

37. MPM's use of unauthorized Cal-Mode continued until on or about November 22, 2008.

VI. CAA AND ECL ARTICLE 19 STATUTORY AND REGULATORY BACKGROUND

1. National Emissions Standards for Hazardous Air Pollutants Regulations

38. Section 112 of the CAA, 42 U.S.C. § 7412, requires EPA to publish a list of hazardous air pollutants ("HAPs"), and further requires EPA to promulgate regulations establishing national emissions standards, referred to as National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") for these pollutants. The Act also directs EPA to promulgate these emissions standards based on the maximum achievable control technology ("MACT").

39. On March 16, 1994, EPA promulgated regulations codified at 40 C.F.R. §§ 63.1–16 (Part 63, Subpart A), which set forth definitions and general requirements applicable to all sources subject to any NESHAP promulgated under 42 U.S.C. § 7412. EPA has delegated to DEC the authority to include NESHAP requirements in MPM's air permit and enforce those requirements. 67 Fed. Reg. 5216 & 6 NYCRR § 200.10.

40. 40 C.F.R. § 63.2 defines "existing source" as any affected source that is not a new source.

41. Federal and NYS laws and regulations define "owner or operator" as any person who owns, leases, operates, controls, or supervises a stationary source; and those laws define "stationary source" as any building, structure, facility, or installation that emits or may emit any air pollutant. 40 C.F.R. § 63.2; ECL § 19-0107(24); 6 NYCRR §§ 200.1(bc), 200.1(ba) and 200.1(cd).

42. Federal and NYS laws and regulations define "major source" to include any stationary source that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of HAPs. 40 C.F.R. § 63.2 and 6 NYCRR § 201–2.1(21)

43. Section 114(a)(1) of the CAA, 42 U.S.C. § 7414(a)(1), and 6 NYCRR §§ 201 *et seq.* authorize EPA and NYS to require owners and operators of any emission source to provide specific information regarding their facilities; establish and maintain records; make reports; sample emission points; and install, use, and maintain such monitoring equipment or methods in order to determine whether any person is in violation of the CAA or any permit issued pursuant to an approved State air program.

2. Hazardous Waste Combustor NESHAP

44. On September 30, 1999, EPA promulgated the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors (hereinafter "Hazardous Waste Combustor NESHAP"), 40 C.F.R. §§ 63.1200–1221 (Part 63, Subpart EEE). NYS has incorporated the Hazardous Waste Combustor NESHAP in its regulatory and permitting program. 6 NYCRR § 200.10, table 4.

45. The Waterford Facility was subject to the CAA, the Hazardous Waste Combustor NESHAP, ECL Article 19, and 6 NYCRR § 201, because it emitted 10 tons per year or more of a HAP, or emitted 25 tons per year or more of any combination of HAPs, and therefore was a major source of HAPs.

46. 40 C.F.R. § 63.1200 indicates that the provisions of the Hazardous Waste Combustor NESHAP applies to, *inter alia*, hazardous waste incinerators. The provisions of ECL § 19-0304 apply to burning hazardous waste in a hazardous waste incinerator.

47. The Incinerator at the Waterford Facility is a hazardous-waste incinerator within the meaning of the CAA and ECL Article 19. 40 C.F.R. § 63.1201(a).

48. The Hazardous Waste Combustor NESHAP sets specific limits for dioxins and furans; mercury; lead and cadmium; arsenic, beryllium and chromium; CO; hydrochloric acid and

chlorine gas; and particulate matter that are emitted from existing sources into the atmosphere. 40 C.F.R. § 63.1203(a). For example, the limit for CO specifies that emissions must not be in excess of 100 parts per million by volume ("ppmv"), over an hourly rolling average (monitored continuously with a continuous emissions monitoring system ("CEMS")).

49. 40 C.F.R. § 63.1207(b)(1) requires sources of such emissions to conduct a comprehensive performance test to demonstrate compliance with the emission standard(s) provided by the Hazardous Waste Combustor NESHAP, establish operating parameter limits for the operating parameters provided by Section 63.1209, and demonstrate compliance with the performance specifications for continuous monitoring systems.

50. 40 C.F.R. § 63.1210(d), requires that a Notification of Compliance ("NOC") include, *inter alia*, results of the comprehensive performance test, and be submitted to EPA and NYS.

51. On July 22, 2004, GE submitted to EPA and NYS a NOC for the Incinerator. The NOC contained the results of the comprehensive performance test and established the operating parameters GE would use to determine continual compliance. Table B of the NOC contained the operating parameters (*i.e.*, negative pressure in the Incinerator's combustion chamber shall not exceed -0.3 inches of water and the scrubber voltage shall not go below 17 kilovolts) that, if deviated from, should trigger AWFCOs.

52. 40 C.F.R. § 63.1206(c)(1)(i), required MPM to operate the Incinerator in compliance with the operating parameters specified in the NOC.

53. 40 C.F.R § 63.1203(a)(5)(i), prohibits owners and operators of emission sources such as the Incinerator, from causing combustion gases to be emitted into the atmosphere that contain CO in excess of 100 ppmv over an hourly rolling average.

54. 40 C.F.R. § 63.1201, defines an AWFCO system as a system comprised of cutoff valves, actuator, sensor, data manager, and other necessary components and electrical circuitry designed, operated and maintained to stop the flow of hazardous waste to the combustion unit automatically and immediately when any operating parameter limit is exceeded.

55. 40 C.F.R. § 63.1206(c)(3)(i), required the Incinerator to have a functioning AWFCO system that immediately cut off hazardous waste feed when the Incinerator was operating outside the operating parameter limits.

56. Pursuant to 40 C.F.R. § 63.1206(c)(3)(iv), an owner or operator of the Incinerator has failed to comply with the AWFCO requirements set out in Section 63.1206(c)(3) if the AWFCO system fails to automatically and immediately cutoff the flow of hazardous waste upon exceedance of a parameter required to be interlocked with the AWFCO.

57. 40 C.F.R. § 63.1209(a)(1)(i), requires owners or operators using an incinerator to use a CO CEMS to monitor compliance with the CO operating parameter contained in Section 63.1203(a)(5)(i).

58. 40 C.F.R. § 63.1209(a)(2) requires owners or operators using an incinerator to install, calibrate, maintain and continuously operate the CEMS in compliance with the quality assurance procedures provided in the Hazardous Waste Combustor NESHAP Appendix.

59. Pursuant to Condition 6.2 of the Hazardous Waste Combustor NESHAP Appendix, a facility may continue to burn hazardous waste for a maximum of 20 minutes while calibrating the CO CEMS.

60. 40 C.F.R. § 63.1209(b)(1), requires owners or operators using an incinerator to have continuous monitoring systems ("CMS") (*e.g.*, thermocouples, pressure transducers and flow

meters), to document compliance with the applicable operating parameters under the Hazardous Waste Combustor NESHAP.

61. 40 C.F.R. § 63.1209(b)(3), requires an incinerator's CMS to, *inter alia,* sample each operating parameter without interruption, and compute and record the average values every 60 seconds.

62. 40 C.F.R. § 63.1209(p), requires owners or operators using an incinerator to instantaneously monitor the combustion chamber pressure and the AWFCO system must be engaged when negative pressure is not adequately maintained in the combustion chamber.

3. Title V Operating Permit Program

63. Pursuant to Section 502(b) of the CAA, 42 U.S.C. § 7661a(b), EPA promulgated regulations establishing the Title V operating permit program. The Title V operating permit program is administered by State air pollution control agencies under EPA-approved state statutory programs. 57 Fed. Reg. 32250 (July 21, 1992); 40 C.F.R. Parts 70 and 71. DEC is the State agency that administers the EPA-approved NYS Title V permit program pursuant to the air pollution laws set forth in ECL Article 19 and 6 NYCRR Part 200 *et seq*.

64. Section 502(d) of the CAA, 42 U.S.C. § 7661a(d) and 40 C.F.R. § 70.4 requires each state to submit to EPA for approval its statutory permitting program, developed in accordance with Part 70. If EPA approves the state permitting program, the state is authorized to administer the Title V operating permit program.

65. On January 31, 2002, EPA approved, NYS's Title V Operating Permit Program. The NYS Title V Operating Permit Program is set forth in ECL Article 19 and 6 NYCRR. Part 201. In its Title V Operating Permit Program, NYS has incorporated by reference the federal CAA regulations in 40 CFR Part 63 *et seq*, and has the authority to include those applicable

requirements in operating permits. 6 NYCRR § 200.10

66. Section 502(a) of the CAA, 42 U.S.C. § 7661a(a); 40 C.F.R. § 70.6(6)(i); and 6 NYCRR Part 201 of the NYS Title V Operating Permit Program, make it unlawful for any person to operate a major source except in compliance with a Title V Operating Permit.

67. 6 NYCRR § 201–6.5(c)(2)[1] requires records of all monitoring data and support information be retained for at least five years from the date of the monitoring, sampling, measurement, report, or application. The provision specifies that support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, all quality assurance information and copies of all reports required by the permit.

68. 6 NYCRR § 201–6.5(e)[2] requires that sources certify compliance with the Title V Operating Permit annually and submit annual compliance certifications to DEC and EPA.

4. CAA Title V Permit

69. DEC received GE's Title V Permit application for the Facility on December 9, 1998.

70. On November 27, 2001, DEC issued Title V Operating Permit No. 5-4154-00002/01743 to GE for the Facility. On September 1, 2002, DEC modified the Title V Permit, *inter alia*, to incorporate the requirements of the Hazardous Waste Combustor NESHAP. In connection with its purchase of the Waterford Facility, MPM submitted an application to DEC requesting that the Permits be transferred from GE to MPM. DEC granted the application and the Permits were transferred, effective December 4, 2006. On January 7, 2008, DEC modified the Title V Permit to incorporate the Incinerator operating permit limits as individual permit conditions. The initial permit, the 2002 modification, and the 2008

[1] Now codified at 6 NYCRR § 201-6.4(c)(2).
[2] Now codified at 6 NYCRR § 201-6.4(e).

modification are referenced together for purposes of this Complaint as the "Title V Permit."

71. Condition 68 of the Title V Permit required MPM to comply with 40 C.F.R. § 63, Subpart EEE. This Condition incorporated the requirements of the Hazardous Waste Combustor NESHAP into the Title V Permit, which included the CO emission standards, the AWFCO operating parameters, the comprehensive performance test requirement, the CO CEMS and CMS monitoring requirements, recordkeeping requirements and notification requirements.

72. Pursuant to Condition 1–4 of the Title V Permit, the owner or operator of the Facility was required to submit a compliance certification annually that identified each term or condition of the Title V Permit that is the basis of the certification, the compliance status, whether compliance was continuous or intermittent, and the method(s) used for determining the compliance status of the Facility.

73. Pursuant to Condition 389.2 of the Title V Permit, the Facility was required to maintain maximum combustion chamber pressure of -0.3 inches of water and the AWFCO system was required to engage when negative pressure was not adequately maintained.

5. CAA and ECL Enforcement Authority

74. 42 U.S.C. § 7413(a)(3), provides that EPA may bring a civil action if it finds that any person has violated or is in violation of CAA requirements, including 40 C.F.R. Part 63, Subpart EEE, Title V of the CAA, any permit issued pursuant to Title V of the Act, and the NYS Title V Operating Permit Program. ECL § 71-2103 provides that DEC may bring a civil action against any person for violations of ECL Article 19 and/or the regulations promulgated thereunder, or any permit issued pursuant to those provisions. The United States and the State, having undertaken to prosecute this matter jointly, do not seek to recover duplicative penalties under both federal and state law for the violations asserted herein.

75. 42 U.S.C. § 7413(b), authorizes EPA to initiate a civil enforcement action for injunctive relief and civil penalties of up to $32,500 per day for each violation that occurred from March 16, 2004 through January 12, 2009.

76. ECL § 71-2103 authorizes DEC to initiate a civil administrative and judicial enforcement action for civil penalties, and provides that any person who violates any provision of ECL Article 19, or any regulation promulgated thereunder after May 16, 2003, shall be liable for a civil penalty for a first violation: up to $15,000 per violation, and $15,000 per day for each day the violation continues; and for a second and any subsequent violation: up to $22,500 per violation, and $22,500 per day for each day the violation continues.

VII. CAA and ECL ARTICLE 19 CLAIMS FOR RELIEF

77. Paragraphs 1 through 76 are realleged and incorporated herein by reference.

78. At all times relevant to this Complaint, MPM was a "person" within the meaning of 42 U.S.C. § 7602(e) and ECL§ 19-0107(1).

79. At all times relevant to this Complaint, MPM was the "owner" and/or "operator" of the Facility within the meaning of 40 C.F.R. § 63.2 and the owner/operator of an air contamination source within the meaning of ECL § 19-0107(5) and (19) and 6 NYCRR § 200.1(f).

80. At all times relevant to this Complaint, the Facility was an "existing source" within the meaning of 40 C.F.R. § 63.2.

81. At all times relevant to this Complaint, the Facility was a "major source" within the meaning of 40 C.F.R. § 63.2 and 6 NYCRR § 201-2.1(21); and was a "major air contamination source" within the meaning of ECL § 19-0107(19).

82. At all times relevant to this Complaint, MPM was subject to the terms and conditions of the

Title V Permit issued by DEC and to the statutory and regulatory requirements of the CAA, 40 CFR Part 63, ECL Article 19, and 6 NYCRR Part 201 *et seq*.

1. Incinerator Emitted CO in excess of 100 ppmv

83. Paragraphs 1 through 82 are realleged and incorporated herein by reference.

84. Condition 68 the Title V Permit prohibited MPM from causing combustion gases containing CO in excess of 100 ppmv from being discharged into the atmosphere from the Incinerator.

85. On at least March 28, 2007; April 4, 2007; June 21, 2007; July 3, 2007; July 25, 2007; August 5, 2007; August 6, 2007; August 8, 2007; August 13, 2007; August 16, 2007; August 18, 2007; August 29, 2007; September 10, 2007; and September 28, 2007, the Incinerator owned and/or operated by MPM discharged CO in excess of 100 ppmv.

86. Each of these discharges constitutes a violation by MPM of the CAA, the Hazardous Waste Combustor NESHAP, Title V of the CAA, the NYS Title V Permit Program, ECL Article 19 and 6 NYCRR Parts 200 – 201, and the Title V Permit.

87. For each violation referenced in this claim, MPM is subject to civil penalties as set forth in Paragraphs 75 and 76.

2. Failure to Continuously Operate the Incinerator AWFCO System

88. Paragraphs 1 through 87 are realleged and incorporated herein by reference.

89. 40 C.F.R. §§ 63.1206(c)(3)(i) and (iv) and 6 NYCRR § 200.10, table 4, required MPM to continuously operate an AWFCO system at the Incinerator that would stop the flow of hazardous waste to the Incinerator automatically and immediately when any operating parameter was exceeded.

90. 40 C.F.R. 63.1209(p), requires, *inter alia*, that the AWFCO system be engaged when negative pressure is not adequately maintained in the combustion chamber.

91. From December 4, 2006 through March 26, 2008, MPM placed the Incinerator monitors into unauthorized Cal-Mode on more than one occasion when operating parameters were exceeded. Those occasions included:

   a. When CO was emitted in excess of 100 ppmv as set forth above, in paragraph 85;

   b. When negative pressure was not adequately maintained in the Incinerator's combustion chamber (exceeded -0.3 inches of water) on at least 193 occasions;

   c. When the cross current water scrubber flow rate went below 1,160 gallons per minute on at least one occasion; and

   d. When the voltage for the Scrubbers fell below 17 kilovolts on at least 12 occasions.

92. Each of these violations is a violation of the CAA, the Hazardous Waste Combustor NESHAP, Title V of the CAA, the NYS Title V Operating Permit Program, ECL Article 19 and 6 NYCRR Parts 200 – 201, and the Title V Permit.

93. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 75 and 76.

3. Failure to Continuously Monitor Incinerator Operating Parameters

94. Paragraphs 1 through 93 are realleged and incorporated herein by reference.

95. 40 C.F.R. § 63.1209(b)(3) and 6 NYCRR § 200.10, table 4, require MPM to continuously monitor the Incinerator's CMS to, *inter alia,* sample each operating parameter without interruption, and compute and record the average values every 60 seconds.

96. From December 4, 2006 through November 22, 2008, MPM failed to continuously monitor Incinerator operating parameters by placing the Incinerator monitors into unauthorized Cal-Mode and by continuing to feed hazardous waste into the Incinerator.

97. Each of these violations is a violation of the CAA, the Hazardous Waste Combustor NESHAP, Title V of the CAA, the NYS Title V Operating Permit Program, ECL Article 19 and 6 NYCRR Parts 200 – 201, and the Title V Permit.

98. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 75 and 76.

4. Failure to Instantaneously Monitor Incinerator Combustion Chamber Pressure

99. Paragraphs 1 through 98 are realleged and incorporated herein by reference.

100. 40 C.F.R. 63.1209(p), requires, *inter alia*, owners or operators using an incinerator to instantaneously monitor the combustion chamber pressure.

101. From December 4, 2006 through November 22, 2008, MPM failed to perform instantaneous monitoring of combustion chamber pressure by placing the Incinerator monitors into unauthorized Cal-Mode.

102. Each of these violations is a violation of the CAA, the Hazardous Waste Combustor NESHAP, Title V of the CAA, the NYS Title V Operating Permit Program, and the Title V Permit.

103. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 75 and 76.

5. Failure to Identify Noncompliance with Incinerator's Operating and Monitoring Parameters in MPM's Annual Title V Certifications

104. Paragraphs 1 through 103 are realleged and incorporated herein by reference.

105. 6 NYCRR § 201–6.4(e) requires that sources certify compliance annually and submit annual certifications to DEC and EPA.

106. Condition 1-4 of the Title V Permit, required the Facility to submit a compliance certification annually to DEC that contained an identification of each term or condition of the Title V

Permit that is the basis of the certification, the compliance status, whether compliance was continuous or intermittent, and the method(s) used for determining the compliance status of the Facility.

107. For 2006, MPM submitted an annual compliance certification report that falsely reported its compliance status with the Hazardous Waste Combustor NESHAP, the Title V Operating Permit Program, ECL Article 19 and 6 NYCRR Parts 200 - 201, and the Title V Permit.

108. This submission is a violation of the CAA, the Hazardous Waste Combustor NESHAP, Title V of the CAA, the Title V Operating Permit Program, ECL Article 19 and 6 NYCRR Parts 200 – 201, and the Title V Permit.

109. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 75 and 76.

VIII. RCRA STATUTORY AND REGULATORY BACKGROUND

1. Federal and Federally-Authorized State Hazardous Waste Regulations

110. In 1976, Congress enacted RCRA, amending the Solid Waste Disposal Act, to regulate hazardous waste management. RCRA Subtitle C, 42 U.S.C. § 6921 *et seq*., empowers EPA to identify and list hazardous wastes. It also authorizes EPA to regulate hazardous waste generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities. EPA has promulgated regulations to implement RCRA Subtitle C that are set forth at 40 C.F.R. Parts 260–279. Pursuant to 42 U.S.C. § 6926, EPA may authorize a state to develop and administer its own RCRA hazardous waste management regulations in lieu of the federal regulations.

111. In September 1978, the New York Legislature passed hazardous waste laws set forth in ECL Article 27, Title 9, which from time to time was thereafter amended consistent with RCRA.

On May 29, 1986, EPA granted New York State final authorization to administer certain State hazardous waste regulations in lieu of the federal regulations. *See* 51 Fed. Reg. 17737. On various later dates, EPA authorized New York State to administer additional hazardous waste laws and regulations. 40 C.F.R. § 272.1651. *See also* 67 Fed. Reg. 49864 (Aug. 1, 2002), 70 Fed. Reg. 1825 (Jan. 11, 2005), 74 Fed. Reg. 31380 (July 1, 2009), and 78 Fed. Reg. 15299 (Mar. 11, 2013). The federally-authorized NYS hazardous waste regulations are set forth at 6 NYCRR Parts 370–376.

112. The authorized New York State hazardous waste regulations are incorporated by reference as part of the hazardous waste management program under Subtitle C of RCRA at 40 C.F.R. § 272.1651(c).

113. On or about August 18, 1980, GE, in accordance with the requirements of Section 3010 of RCRA, 42 U.S.C. § 6930, notified EPA that it conducted activities involving "hazardous waste" at the Waterford Facility. In response to that notification, EPA provided GE with EPA RCRA identification number NYD002080034.

114. GE thereafter submitted to DEC both its RCRA Part A and Part B permit applications for an Industrial Hazardous Waste Management Permit ("RCRA Permit") pursuant to the requirements of ECL §§ 27-0900, 27-0913 and 6 NYCRR Part 373. On or about October 19, 1989, DEC issued a RCRA Permit (NYD002080034) to GE (the "1989 RCRA Permit") for the storage and disposal of hazardous waste by incineration and/or landfilling at the Waterford Facility. The 1989 RCRA Permit became effective on December 18, 1989 and was to expire on December 17, 1994.

115. Pursuant to 6 NYCRR §§ 373 –1.6(a)(2) and 373–1.8, if a permittee wished to continue an activity regulated by its permit after the permit was set to expire, that permittee had to timely

submit a complete application for a permit renewal.

116. Prior to the expiration of the 1989 Permit, on or about October 18, 1993, GE submitted to DEC its RCRA Permit renewal application which, pursuant to the State Administrative Procedure Act § 401 and DEC's regulations, 6 NYCRR § 621.11(l), extended the 1989 RCRA Permit. GE continued to operate the Incinerator at the Waterford Facility.

117. In or about January 1999, DEC issued a renewal of GE's RCRA Permit for the operation of its Waterford Facility, including the Incinerator. The renewed RCRA Permit took effect on or about January 12, 1999 and was set to expire on January 12, 2004. From time to time thereafter, DEC issued minor modifications to the RCRA permit. In or about November 2000, GE formed a limited liability company known as GE Silicones, LLC, with a principal place of business at the Waterford Facility. In or about June 2001, GE requested that DEC transfer the RCRA permit to GE Silicones and DEC approved the substitution of GE Silicones as the named permittee on the RCRA Permit.

118. Under the terms of the RCRA Permit, GE, and thereafter GE Silicones, was the owner and operator of the Waterford Facility.

119. In accordance with the requirements of the RCRA Permit, GE Silicones, on or about July 14, 2003, submitted to DEC a timely and complete RCRA Permit-renewal application.

120. Since GE Silicones timely submitted a RCRA Permit renewal request and was awaiting approval by DEC, GE Silicones was authorized pursuant to the State Administrative Procedure Act § 401 and DEC's regulations, 6 NYCRR § 621.11(1), to continue to operate the Waterford Facility under the terms and conditions of the RCRA Permit.

121. After Nautilus purchased the Facility from GE in 2006, MPM filed an application with the DEC requesting that the State's environmental permits pertaining to the Facility be

transferred to it effective December 4, 2006. This request was subsequently granted, and MPM continued to own and operate the Facility under the terms and conditions of the RCRA Permit, and in accordance with § 401 of the State Administrative Procedure Act and 6 NYCRR § 621.11.

2. RCRA and ECL Enforcement Authority

122. 42 U.S.C. § 6928(a) authorizes the United States to commence a civil action for EPA to enforce the requirements of the federally-approved NYS hazardous waste program. ECL § 71-2705 authorizes DEC to enforce the requirements of NYS's hazardous waste program set forth in ECL Article 27, Title 9 and 6 NYCRR Parts 370-376, and to enforce the terms and conditions of hazardous waste permits. The United States and NYS, having undertaken to prosecute this matter jointly, do not seek to recover duplicative penalties under both federal and state law for the violations asserted herein.

123. 42 U.S.C. § 6928(g) provides that any person who violates any requirement of a federal RCRA regulation, or any requirement of a federally-authorized state hazardous waste program, shall be liable to the United States for a civil penalty. This section, as amended to account for inflation, authorizes the United States to initiate a civil enforcement action for civil penalties of up to $32,500 per day for each violation that occurred from March 16, 2004 through January 12, 2009.

124. ECL § 71-2705 provides that any person who violates any provision of, or who fails to perform any duty imposed by New York's hazardous waste laws and regulations, ECL Article 27, Title 9 and 6 NYCRR Parts 370-376, or violates any term or condition of a RCRA permit after May 16, 2003 shall be liable for a civil penalty of not more than $37,500 for each initial violation and $37,500 for each day the initial violation continues; and of not more

than $75,000 for the second and each subsequent violation and $75,000 for each day the second violation and any subsequent violation continues.

IX. RCRA CLAIMS FOR RELIEF

125. Paragraphs 1 through 37 and 110 through 124 are realleged and incorporated herein by reference.

126. At all times relevant to this Complaint, MPM has been a "person" as that term is defined in 42 U.S.C. § 6903(15) and 6 NYCRR § 370.2.

127. At all times relevant to this Complaint, MPM has been the "owner" and/or "operator" of the Facility as those terms are defined in 6 NYCRR § 370.2.

1. Failure to Maintain a Functioning Automatic Waste Feed Cut-Off System.

128. Paragraphs 1 through 37 and 110 through 127 are realleged and incorporated herein by reference.

129. Module IX Section D: OPERATING CONDITIONS, Item (12) of the RCRA Permit states "the permittee must maintain the system specified in Table IX.4 of this permit module to automatically stop the flow of hazardous waste to the [I]ncinerator when the operating conditions are not within the limits established in Sections IX.C and IX.D of this module."

130. Pursuant to 6 NYCRR § 373-2.15(f)(5) "an [I]ncinerator must be operated with a functioning system to automatically cut off waste when operating conditions deviate from limits established under paragraph (1) of this subdivision."

131. From December 4, 2006 through November 22, 2008, MPM placed the Incinerator in unauthorized Cal-Mode at least 4,213 times.

132. Each time the Incinerator was placed in unauthorized Cal-Mode, MPM failed to maintain a functional waste-feed system to automatically stop the flow of hazardous waste to the

Incinerator when the operating conditions were not within the limits established by the permit constituted a violation of Module IX Section D: OPERATING CONDITIONS Item (12) of the RCRA Permit and 6 NYCRR § 373-2.15(f)(5).

133. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 123 and 124.

2. Failure to Cease Operating the Incinerator when Operating Conditions Exceeded Limits Designated in the Permit

134. Paragraphs 1 through 37 and 110 through 133 are realleged and incorporated herein by reference.

135. Module IX Section D: OPERATING CONDITIONS, Item (14) of the RCRA Permit states: "[t]he Permittee must cease operation of the [I]ncinerator when changes in … operating conditions exceed[] limits designated in this permit as required by 6 NYCRR § 373–2.15(f)(6)."

136. Pursuant to 6 NYCRR § 373–2.15(f)(6) "[t]he Permittee must cease operation of the [I]ncinerator when changes in … operating conditions exceed[] limits designated in this permit."

137. From December 4, 2006 through November 22, 2008, MPM failed to cease operation of the Incinerator when changes in operating conditions were outside the limits designated in the RCRA Permit.

138. Each time the Incinerator's operating conditions exceeded the limits designated in the RCRA Permit and the Incinerator was in unauthorized Cal-Mode, therefore preventing the AWFCO system from initiating a waste feed cutoff, MPM failed to cease operation of the Incinerator which constituted a violation of Module IX Section D: OPERATING CONDITIONS Item (14) of the RCRA Permit and 6 NYCRR § 373–2.15(f)(6).

139. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 123 and 124.

3. Incinerator Emitted CO in excess of 100 ppmv

140. Paragraphs 1 through 37 and 110 through 139 are realleged and incorporated herein by reference.

141. Pursuant to 6 NYCRR §§ 373–2.15(f)(1) and (2), an incinerator must be operated in accordance with the operating conditions specified in the permit and must specify acceptable operating limits for carbon monoxide (CO) level in the stack exhaust gas."

142. Module IX Section D: OPERATING CONDITIONS, Item (3) of the RCRA Permit states: The Permittee shall operate the rotary kiln incinerator only under the following condition "[s]tack gas concentration of carbon monoxide measured as specified in Condition IX.D (13) [monitoring conditions] and as corrected to 7% Oxygen, dry volume in the stack shall not exceed 100 ppmv on an hourly rolling average.

143. On at least March 28, 2007, April 4, 2007, June 21, 2007, July 3, 2007, July 25, 2007, August 5, 2007, August 6, 2007, August 8, 2007, August 13, 2007, August 16, 2007, August 18, 2007, August 29, 2007, September 10, 2007, and September 28, 2007, the Incinerator owned and/or operated by MPM discharged CO in excess of 100 ppmv on an hourly rolling basis thereby violating Module IX Section D: OPERATING CONDITIONS Item (3) of the RCRA Permit and 6 NYCRR §§ 373–2.15(f)(1) and (2).

144. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 123 and 124.

4. Failure to Instantaneously Monitor Incinerator Combustion Chamber Pressure

145. Paragraphs 1 through 37 and 110-144, are realleged and incorporated herein by reference.

146. Pursuant to 6 NYCRR § 373–2.15(f)(1) an incinerator must be operated in accordance with the operating conditions specified in the permit.

147. Module IX Section D: OPERATING CONDITIONS, Item (13) of the RCRA Permit states that combustion chamber pressure must be monitored on a continuous basis.

148. From December 4, 2006 through November 22, 2008, MPM failed to perform instantaneous monitoring of combustion chamber pressure by placing the Incinerator monitors into unauthorized Cal-Mode.

149. Each time the Incinerator monitors were placed in unauthorized Cal Mode, MPM failed to perform instantaneous monitoring of combustion chamber pressure in violation of Module IX Section D OPERATING CONDITIONS Item (13) and 6 N.Y.C.R.R. § 373-2.15(f)(1).

150. For each violation referenced in this claim, MPM is subject to penalties as set forth in Paragraphs 123 and 124.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the United States of America and the State of New York, respectfully requests that the Court grant the following relief:

1. For violations of federal law, assess a civil penalty of up to $32,500 per day for each violation occurring on or from March 16, 2004 through January 12, 2009;

2. For violations of New York law occurring on or after May 16, 2003, assess a civil penalty pursuant to ECL §§ 71-2103 and 71-2705 as follows:

   a. For violations of the NYS Air Permit and applicable regulations, $15,000 per day for each initial violation and for each day the initial violation continued; and $22,500 per day for a second and any subsequent violations and for each day the second and subsequent violations continue.

b. For violations of the NYS RCRA Permit and applicable regulations, $37,500 per day for each initial violation and for each day the initial violation continues; and $75,000 for the second and each subsequent violation and for each day the second violation and subsequent violations continue.

3. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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